JOYCE
JJ
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January 8, 1993

Via Hand Delivery

Donna R. Searcy, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Celpage, Inc. Reply Comments
Gen. Docket No. 90-314,
ET Docket No. 92-100, RM-7140

Dear Ms. Searcy:

Transmitted herewith, on behalf of Celpage, Inc., please find enclosed the original and four (4) copies of its Reply Comments in the above-referenced Rulemaking proceedings.

If you have any questions or require additional information concerning this matter, kindly contact the undersigned.

Sincerely,

Frederick M. Joyce

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of:	)	
	)	
Amendment of the Commission's	)	Gen. Docket No. 90-314
Rules to Establish New	)	ET Docket No. 92-100
Personal Communications Services.	)	RM-7140, et al.
	)	
	)	

To: The Commission

REPLY COMMENTS OF CELPAGE, INC.

Frederick M. Joyce
Its Counsel

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Date: January 8, 1993

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SUMMARY

Celpage agrees with some of the commenters in this Rulemaking proceeding that Advanced Messaging Services ("AMS") issues should be resolved in a separate proceeding from Personal Communications Services ("PCS") proposals, noting that the two services have attracted mostly different commenting parties. Also, AMS issues and proposed rules could probably be solved more swiftly than those facing the Commission for PCS.

As a holder of both RCC and PCP licenses, Celpage believes the Commission should designate AMS services as either private or common carrier: widely different federal and local rules prevail for each, and giving some licensees a choice to self-designate their service would be unfair to those holding conventional RCC or PCP licenses, many of whom might not be represented in these proceedings.

Since successful paging operations have primarily been of a local nature, Celpage would encourage local awards of AMS licenses. Designation of AMS as a nationwide or region-wide service could easily lead to stockpiling of frequencies by a few large, wealthy carriers, resulting in less-than-optimum use of available frequencies, and little competition in service. For the same procompetitive reason, Celpage favors no restrictions on the number of licenses per market. Regarding the geographic size of AMS service areas, Celpage would direct the Commission's attention to the success of cellular geographic allocations, and suggest the same be used for AMS.

Celpage agrees with many commenters that speculative applications should be discouraged, but notes that recommended solutions may burden legitimate operators while failing to deter application mills. Instead, Celpage recommends the elimination of incentives for speculative application through strictly-enforced construction deadlines and the adoption of "anti-trafficking" rules such as those now found in Part 21 of the Rules.

Celpage disfavors cellular operator eligibility for AMS licenses, since cellular licensees may have a real incentive to apply for licenses merely to hinder competition from paging operators, and since cellular licensees have sufficient frequency capacity to provide these services without additional allocations. Regarding interconnection rights, Celpage believes that local wireline carriers are obligated to provide interconnection to all private and common carriers under equal terms and at equal rates under Sections 201 and 202 of the Communications Act.

Finally, Celpage directs the Commission's attention to PCP services as an exemplary role model for the proposed AMS services. As enacted, PCP regulation has resulted in lower rates, creative service options and successful businesses without large expenditure of Commission staff and resources.

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To: The Commission

REPLY COMMENTS OF CELPAGE, INC.

Celpage, Inc., through its attorneys, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, respectfully submits these Reply Comments in response to comments filed in the Commission's above-referenced Notice of Proposed Rulemaking and Tentative Decision ("Notice") proceeding, concerning the proposed allocation of radio spectrum for a variety of narrowband "Advanced Messaging Services" and broadband "Personal Communications Services."

I. Statement of Interest.

Celpage is the licensee of Radio Common Carrier and Private Carrier Paging facilities throughout the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and the Continental United States. Celpage provides service to more than 10,000 paging units in Puerto Rico, and has quickly grown to become the third largest paging company in Puerto Rico. Celpage has previously been an interested party and commenter in several FCC rulemaking proceedings pertaining to PCP and RCC paging issues.

Celpage previously filed Comments in response to the

Commission's Petition for Rulemaking to Request Allocating 930-931 MHz Reserve Band Spectrum for Narrowband Data or Advanced Paging Services (ET Docket 92-100), which was a precursor to this rulemaking proceeding. Thus, Celpage has standing as a party in interest to file comments in this proceeding.

II. Summary of Notice and Comments.

The Commission's Notice addressed the following issues which are of particular concern to Celpage: (1) whether narrowband Advanced Messaging Services ("AMS") should be addressed in a proceeding separate from broadband Personal Communications Services ("PCS"); (2) whether such services should be regulated as private or common carrier; (3) the geographic and numerical scope of the radio licenses to be issued for these services; (4) entry standards; and (5) interconnection rights for these licensees.

Among the parties who filed comments in this proceeding, there appears to be a consensus that AMS rules should be drafted in a proceeding separate from PCS rules, in the interests of time.[1] No clear consensus emerged on the issue of private versus common carrier status;[2] but, the commenters favor a "flexible" channel allocation plan that maximizes entry opportunities. The comments expressed an interest in deterring "speculative" filings, while

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[1] See, e.g., Comments of Telocator on 900 MHz Personal Communications Services at 4.

[2] Telocator favors allowing a licensee to choose whether to operate as a private or common carrier service; Telocator Comments at 16; other AMS commenters expressed no opinion on the issue. See, e.g., Comments of Dial Page, Inc.

promoting fair and reasonable interconnection of an AMS service with the local landline carrier.

Celpage is not necessarily in agreement with the majority of the commenters on some of these issues, for reasons to be explained herein.

III. Separate Rulemaking Proceedings Make Sense.

Celpage agrees with those interested parties who favor a separate rulemaking proceeding for the AMS proposal, rather than combining it with PCS rulemaking proposals. Celpage concurs with Telocator's impression that the issues and proposed rules for AMS lend themselves to a speedier resolution than do the thornier PCS issues.[3]

In addition to technical and regulatory differences between the services, it is evident from the Comments filed in these proceedings that PCS and AMS have, to a large extent, attracted two entirely different sets of commenting parties. Most commenters who are interested in building PCS-type services entirely ignored the Notice's request for comments concerning AMS, and vice-versa. Separating these rulemaking proceedings will thus enable the FCC, and interested parties, to focus more clearly and concisely on crafting rules for each distinct service.

IV. The FCC Should Designate These Services As Either Private or Common Carrier.

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[3] See Telocator Comments at 4.

The Commission asked for comments on whether these services should be regulated as private or common carrier. Notice at ¶¶ 94-95. Telocator submits that an AMS licensee should be able to "self-designate" as either private land mobile or common carrier services.[4] Celpage disagrees with that proposal, and questions whether it is permissible under the Communications Act. In Celpage's opinion, the FCC must designate whether these services are to be regulated under Part 90 or Part 22 of the Rules, and then the licensees must conduct their services accordingly.

As both an RCC and a PCP licensee, Celpage has had to comply with different laws, federal and local, that apply to each service, as well as different FCC regulations governing the different services. Celpage and many similar licensees have spent countless time and money in complying with these regulatory differences. At this late date, it is far from fair to ask those who have complied with the rules set down by the Communications Act to compete against an "elite" group of licensees, the AMS licensees, who will have "self-designating" status, while their competitors are left with no choice in the matter. This regulatory imbalance would by no means lead to a level regulatory playing field.

Moreover, it is far from apparent that these AMS/PCS rulemaking proceedings would provide a fair, adequate, and legal forum for resolving the complex issues that underlie the statutory distinctions between private and common carrier status. The private/common carrier distinction is statutory, and should not be

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[4] Telocator Comments at 16.

open to random selection by a few interested parties. There are hundreds of licensed radio operators nationwide who would be affected by a Commission decision concerning whether a carrier may designate its own legal status; yet, many if not most of those licensees have no stake in these particular rulemaking proceedings, due to the nature of the services. In short, the question of regulatory status is too fundamental and controversial to be fairly resolved in a new service rulemaking proceeding that has been dominated, so far, by comments from the nation's largest wireline and radio common carriers.

Rather than tinker with statutory definitions, the FCC should, as it has in the past, simply designate whether AMS services will be allocated to Part 22 or Part 90 of the Rules, or both, on a mutually exclusive basis. Then, if an applicant applies for Part 90 AMS licenses, that applicant will be expected to comply with all appropriate laws and regulations in the Private Land Mobile Radio Services.

V. No Arbitrary Geographic Standards Should be Imposed.

Celpage disagrees with the notion that AMS allocations should be set aside exclusively for regional and nationwide service licenses.[5] It is by no means evident that the recent demand for paging services has been generated by region-wide or nationwide services. Indeed, anecdotal evidence of the failures of nationwide paging companies suggests that the contrary may be the trend: that

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[5] Cf., Notice at par. 62; Telocator Comments at 10.

paging is essentially a local service.

Whatever the case may be, Celpage can discern no public interest justification for designating AMS as only a region-wide or nationwide service, to the exclusion of those that would like to provide AMS on a local basis to interested subscribers. Only the largest carriers will have the financial wherewithal to apply for and construct AMS systems on a multi-state or nationwide basis; thus, the FCC would have foreclosed AMS to hundreds of local paging and mobile radio operators and their subscribers.

Once those frequencies are given away to the largest carriers, precedents suggest that the frequencies will not subsequently be taken back and made available for smaller users, even if nationwide demand fails to meet the touted expectations. Instead, a small number of carriers will be left holding unused AMS frequencies until such time as demand warrants, or, until they are allowed to use those frequencies for local purposes, where there may be sufficient demand. The distinct possibility that these frequencies will lay fallow due to unnecessary licensing restrictions cannot be in the public's best interests.

Celpage contends that AMS licenses should be granted on a local basis, while allowing those entities that may be interested in linking local networks together to form regional or nationwide networks without arbitrary boundaries. The "regional markets" proposed by some commenters have been arbitrarily drawn[6], and are

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[6] For instance, Celpage can attest, as a Puerto Rico-based carrier, that its customers do not routinely ask for Puerto Rico to New York "region-wide" service. But see, Telocator Comments at 12-

certainly speculative at this stage in the development of AMS services. Moreover, it would be spectrally inefficient to let one licensee tie up an entire region for a period of years, perhaps "cherry picking" only the most lucrative markets while ignoring smaller locations.

On the other hand, the cellular model for geographic allocation of licenses has proven to be relatively sound. Robust demand for cellular services in large and small local markets spurred local licensees to quickly link their networks together to form a nationwide, seamless cellular network. Increased demand for local cellular service helped generate the funds necessary to finance the expansion and interconnection of these networks nationwide.

VI. No Arbitrary Limits on Licenses Issued Per Market.

Some of the Commenters have expressly or implicitly proposed a limit on the number of Advanced Messaging Service licenses that should be allocated in a particular region.[7] Celpage repeats its contention that any artificial limits on the number of license allocations per market would have anti-competitive implications, and would not serve the public's interest in obtaining "reasonably priced" communications services from a variety of sources.

There are many in the industry, indeed at the Commission

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[7] See, e.g., Dial Page L.P. at 14, which would restrict license allocations to three per region.

itself, that have had second thoughts about the competitive impact of the "two per market" regulatory structure of the cellular industry. See, e.g., Cellular Bundling Policy, CC Docket 91-34, Report No. DC-2108, (May 14, 1992)(wherein the FCC indicated its "reservations about the status of competition in the cellular service market ...."). See, also, dissenting opinion of Commissioner Duggan. Id.

Celpage submits that AMS allocations should be made on a non-exclusive basis. The marketplace, and the financial wherewithal of the carriers, will surely dictate how many carriers can effectively compete for these services on a local, regional, or ultimately nationwide basis.

VII. AMS Service Areas.

The FCC has solicited comment on how it should define the geographic size of a service area. It has tentatively concluded that service areas should be larger than those initially licensed in the cellular services, to enhance "economies of scale." Notice at ¶ 60.

Celpage agrees with the notion of allocating licenses for a geographic area, rather than for a particular transmitter location. Celpage does not agree, however, that the proposed AMS service areas should be larger than those designated for cellular service. Rather, as previously stated, the cellular geographic allocation model seems to have worked very well, and should be emulated.

VIII. Entry Criteria.

Celpage is all in favor of reducing or eliminating the incentives for "speculators" to apply for AMS and PCS licenses; but, Celpage disagrees with some of the recommended "cures" for this malady. Strict financial qualification criteria are a burden for legitimate operators who must prepare expensive audited financials, or impose upon their already reluctant bankers for the chance of "winning" an FCC lottery. The application mills, on the other hand, do not seem deterred by financial qualifications; indeed, they seem to have no difficulties in finding some bank to authorize blanket loan letters for thousands of hapless "investor/applicants."

Likewise, high application fees may raise the "threshold of pain" for some speculators; but, there too, the pain is more acutely felt by legitimate radio entrepreneurs who intend to use the spectrum rather than sell it at a profit. There are also legal limits to what the FCC may charge for processing an application: the application fee is meant to defray the FCC's legitimate costs incurred in processing applications.[8] If the FCC chooses to adopt "post card" application forms, as the Notice suggests, then it will have even less tenable legal grounds for imposing high application fees.

Rather than raising application fees and financial criteria to a level where only a few well-heeled applicants can afford to apply

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[8] See, Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 948 (1987)

for these licenses, Celpage recommends that the FCC eliminate the incentives for speculation. There are several ways in which the FCC can eliminate the incentives for "application mills" to become involved in these new services, without having the unnecessary and unfair side-effect of precluding legitimate applicants from these services.

First, if the FCC allocates multiple licenses in each geographic area, which it can do with smaller, more efficient bandwidths, then the supply of available licenses should be able to exceed demand in all but the most highly populated markets. Second, construction deadlines should be strictly enforced: if the station is not timely constructed, the permit expires and other applicants may apply for its use.

Finally, the FCC could eliminate or deter speculation by adopting "anti-trafficking" rules similar to those now found in Part 21 of the Rules (similar rules existed under Part 22 not so long ago). See 47 C.F.R. 21.39(a). Under certain circumstances delineated in the Rules, Section 21.39(a) places the burden on a licensee to prove that she is not "trafficking" or speculating in the sale of FCC licenses, particularly when the licensee requests assignment of a license that has been operated for less than one year. Non-speculating AMS applicants should have no objections to a similar rule for this service.

To those commenters who oppose any restrictions upon the "alienation" or assignability of licenses, the response is simple: if good cause exists for assigning a license less than one year

after a grant, such as changed business circumstances, or the opportunity to "trade" a license for one that fits into one's business plans, the FCC will review that request, and would presumably approve it if it is in the public's interest. Since the airwaves belong to the public, not individual licensees, there should be no objections to the FCC's pursuing its statutory duty to ensure in advance that the assignment of its licenses is in the public's best interests.

IX. The PCP Model Should be Emulated.

If the FCC wants to study a perfect "role model" for developing AMS regulations that will nurture this developmental service, it need look no further than to the successful development of private carrier paging services nationwide. The formula was simple: eliminate all state and local barriers to entry, including unnecessary and expensive tariff and certification requirements, allocate sufficient quantities of narrowband channels to accommodate any and all interested service providers in every community, make the application process as simple, inexpensive, and quick as possible, keep regulations and limitations to a minimum, then get out of the way and watch these services take off.

That is precisely what has happened to PCP services in the less than ten years that they have existed. This is a quiet success story of epic proportions, by the mobile communications industry's standards. There are now hundreds of PCP systems operating nationwide, some as small stand-alone services, others as

parts of major state-wide, region-wide, and even nationwide networks. Many of these PCP services are now operating in states that previously saw limited or non-existent competition from monopoly paging carriers, who previously charged as high a rate as the local utility commission could stomach.

PCP competition has brought about lower service rates, increased subscriber counts, creative service options, and decent livelihoods for hundreds of small to large paging entrepreneurs nationwide. All of this was achieved without any lotteries, without any application mills or greenmailers, and without massive amounts of FCC staff and resources. If the FCC and the mobile communications industry want to find solid, achievable answers to their questions about regulating AMS, then to paraphrase Shakespeare: the answers lie "not in the stars, but in ourselves."[9] The answer is to emulate the success story of PCP regulations.

X. Cellular Licensee/Telco Entry Should be Limited.

The Notice sought comment on whether incumbent cellular licensees, and local exchange carriers, should be eligible to apply for 900 MHz AMS licenses. Notice at ¶ 80. Some of the commenters have no objection to the participation of these entities in AMS or PCS services.[10]

Celpage has concerns about the open entry of these carriers

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[9] See, Shakespeare, Julius Caesar, Act I, scene 2 at 134 (1598).

[10] See, e.g., Telocator Comments at 9-10.

into the AMS field, concerns that should be resolved before the FCC decides the matter. The first concern is a matter of need: cellular licensees already have the largest allocation of frequencies per market area of any Part 22 and most Part 90 licensees. Since the FCC has granted cellular licensees flexibility to provide a variety of auxiliary and ancillary services over their networks, the question looms large as to why they should need additional allocations for AMS or PCS services. Cellular carriers may have a real incentive to apply for these frequencies, and let them lie fallow for the duration of the construction period, rather than risk having a paging operator obtain a license that could erode the cellular carrier's customer base.

Those competitive concerns may also apply to local exchange carriers; however, there is an additional competitive concern regarding wireline carriers, that is, fair and equitable interconnection rates and services. Celpage will address this issue separately below.

XI. Interconnection Rights.

It is somewhat odd that the Commission would ask for comments on whether PCS and AMS carriers will have a federally protected right of interconnection to the PSTN, and whether interconnection rights will differ depending on whether these services are classified as private or common carrier. See Notice at ¶¶ 99-102. In Celpage's opinion, the answers are clearly governed by the

Communications Act and its precedents: local telephone carriers are obligated to provide interconnect services to any interested customers upon reasonable demand under fair and non-discriminatory terms. See 47 U.S.C. §§ 201 (a),(b), 202.

The FCC, through a series of "Policy Statements" and "Declaratory Rulings," has regularly exercised its jurisdiction over interconnection matters to ensure that interconnection to the nationwide telephone network will be provided by the wireline telephone companies ("WTCs") on fair and reasonable terms. See, e.g., Cellular Interconnection (Declaratory Ruling), 2 FCC Rcd. 2910 (1987); see also, Radio Common Carrier Services (Post-Divestiture BOC Practices), 59 RR 2d 1275 (1986). AMS and PCS services, regardless of how they are regulated, should be no exceptions to the rule.

There is no language in the Communications Act that allows telephone companies to treat private carriers differently than common carriers. Celpage and many other PCPs have had to fight long and expensive legal battles with local telephone companies to obtain interconnect services on terms that RCCs have enjoyed for more than a decade.[11] The FCC should seize this opportunity to clearly state that this blatant form of discrimination is unlawful and will not be tolerated. These concerns must be resolved before the FCC even considers allowing telephone companies to apply for

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[11] If the FCC were to issue a notice soliciting comments on this single issue of interconnect discrimination, it would receive dozens if not hundreds of anecdotes nationwide concerning the scope of interconnect discrimination.

AMS or PCS licenses.

XII. **Height/Power Limitations.**

With regard to AMS facilities, the Notice proposes height/power limitations similar to those for 900 MHz paging operations in Part 22 of the Rules. Notice at ¶¶ 125-126. Celpage has no objection to those standards; however, it is not apparent that the 20-mile service radius assumptions for 900 MHz paging would be appropriate or applicable for AMS stations, if the Notice's tentative conclusions concerning geographic service areas are adopted. If the Commission separates the AMS proposals from the rest of the PCS proceeding, interested parties will be able to more readily discern these and other inconsistencies between the Notice's proposals and the current Part 22 of the Rules.

CONCLUSION

For all the foregoing reasons, Celpage respectfully submits that the FCC should adopt rules and initiate further proceedings consistent with these Reply Comments.

Respectfully submitted,

CELPAGE, INC.

By: _____
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Date: January 8, 1993

CERTIFICATE OF SERVICE

I, Dennean Ferrell-Myers, a secretary in the law offices of Joyce & Jacobs, do hereby certify that I have on the 8th day of January, 1993, hand-delivered the foregoing Reply Comments of Celpage, Inc. to the following:

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